



Neutral Citation Number: [2019] EWHC 3151 (Admin)

Case No: CO/1789/2019

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22/11/2019

**Before :**

**Mr Justice Cavanagh**

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**Between:**

**Dr Stephen Jones**

**Appellant**

**- and -**

- (1) The Professional Conduct Committee of the  
Teaching Regulation Authority**  
**(2) Secretary of State for Education**

**Respondents**

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**Richard Clayton QC** (instructed by **Duncan Lewis**) for the **Appellant**  
**Iain Steele** (instructed by **Government Legal Department**) for the **Second Respondent**  
The First Respondent did not appear and was not represented

Hearing date: 5 November 2019

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**Approved Judgment**

## **The Honourable Mr Justice Cavanagh:**

### **Introduction**

1. This is a statutory appeal, pursuant to regulation 17 of the Teachers' Disciplinary (England) Regulations 2012 (SI 2012/560, as amended, "the 2012 Regulations"). Following a five-day hearing from 18-22 March 2019, a Professional Conduct Panel ("the PCP"), convened by the Teaching Regulatory Agency ("the TRA"), recommended that a Prohibition Order be made in respect of the Appellant, without provision for a review period. The decision whether to make a Prohibition Order rests with the Second Respondent, the Secretary of State. On 2 April 2019, the Secretary of State, acting through Mr Alan Meyrick, the Chief Executive of the TRA, decided to impose a Prohibition Order without a review period.
2. The effect of this Prohibition Order is that the Appellant is barred indefinitely from teaching, and cannot teach in any school, sixth form college, relevant youth accommodation, or children's home in England. The decision that the Prohibition Order should not have a review period means that the Appellant is not permitted to apply for restoration of his ability to teach.
3. These proceedings are brought against the PCP, as First Respondent, and against the Secretary of State, as the Second Respondent. In my judgment the Secretary of State is right to submit that, in substance, the appeal is only an appeal against the decision of the Secretary of State, because it is a challenge to the decision to impose a Prohibition Order without a review period, and that decision was taken by the Secretary of State, albeit on the recommendation of the PCP. The Secretary of State is, therefore, the correct respondent to the appeal. However, this is of little or no practical significance, because, as was common ground before me, the Secretary of State's decision-making process consists of four stages, two of which involve the PCP. These are first, the decision whether there is a case to answer, such that the matter should be referred to a PCP, second, the findings of fact that are made by the PCP, third, the recommendation by the PCP as regards whether a Prohibition Order should be made, and, if so, whether there should be a review period, and, fourth, the final decision by the Secretary of State (in practice by a senior civil servant) as to whether the PCP's recommendation should be adopted. As will be seen, the Secretary of State is lawfully permitted to delegate the second and third stages to the PCP, but the fact remains that they are part of the Secretary of State's decision-making process. If the PCP acts unlawfully, or if the procedures followed by the PCP are seriously unfair, this will taint the Secretary of State's final decision and will render it liable to being set aside on appeal.
4. The focus of this appeal, therefore, has been on the decision-making process that was carried out by the PCP. However, quite properly, the PCP has not responded to the appeal and had not appeared or been represented at it. The "defence" so to speak, of the decisions of, and procedures followed by, the PCP has been put forward by counsel on behalf of the Secretary of State.
5. The Appellant is represented by Mr Richard Clayton QC and the Secretary of State by Mr Iain Steele. I am grateful to them both for their helpful submissions, both orally and in writing.

6. The Appellant was employed as a teacher by St Columba's College, St Albans ("the College"), from September 2002 until his dismissal for gross misconduct on 8 July 2015. The College is a Catholic Boys' Independent School. The Appellant began his employment at the College as a teacher of religious education. In 2007, he was promoted to Assistant Deputy Headmaster, and in 2013 he was further promoted to be a member of the Senior Leadership Team. Following his dismissal, the Appellant brought claims for unfair dismissal and wrongful dismissal against the College in the Employment Tribunal. These were dismissed in a judgment dated 7 June 2016. The College is not a party to these proceedings.
7. The PCP was formed of a three-person panel consisting of Mr Ian Carter (Chair and teacher panellist) and Ms Jean Carter and Geoffrey Penzer (Lay panellists). The Appellant did not appear, and was not represented, at the PCP hearing in March 2019. By that time, he had moved to live in Canada. On Friday 15 March 2019, the Appellant, through his solicitors, applied to adjourn the PCP hearing, which was due to start on the next working day, Monday 18 March. The PCP declined to adjourn the hearing. At the hearing, the PCP heard evidence from 11 witnesses. These included three pupils in respect of whom it was alleged that the Appellant had failed to maintain appropriate boundaries (Pupils A, B and C).
8. On the late afternoon of Wednesday 20 March 2019, after the hearing had finished for the day, the TRA's Presenting Officer informed that the Appellant's solicitor that the last witness was due to finish giving evidence by the morning of Friday 22 March, and that the PCP had indicated that any additional application or evidence that the Appellant wished to provide must be received by no later than 4pm the following day, Thursday, 21 March. Just before 1 pm on Friday 22 March 2019, by which time the TRA had closed its case, the Appellant applied to give evidence by Skype and to provide three further statements, one from him, and one each from two former members of the College staff. The Appellant appended his own statement to the application notice, but not the other two statements. The PCP declined to admit this additional evidence. The Appellant subsequently provided the PCP with an unsigned draft statement from one of the staff witnesses, the former Nurse Manager, Ms Gill O'Sullivan, at 15.39 pm on 22 March.
9. The key findings that were made by the PCP in relation to the Appellant in its decision, in summary, were as follows:
10. The Appellant had failed to maintain proper professional boundaries with three male pupils, known as Pupils A, B and C, who were around 14 to 16 years old, and who were in the period leading up to their GCSEs.
11. So far as Pupil A was concerned, the Appellant had been asked by Pupil A's parents to be Pupil A's confirmation sponsor, and Pupil A's parents contended that the Appellant had become involved in a very close relationship with Pupil A and had effectively taken it upon himself to act as a "third parent". The PCP found this to be the case.
12. The PCP found that the Appellant went on several foreign holidays with Pupil A and his family, during which the Appellant spent time alone with Pupil A. The Appellant also went on trips alone with Pupil A, without informing the College and deliberately giving Pupil A's parents the impression that these were official school trips. On at

least once occasion, he had stayed in the same hotel room as Pupil A. The PCP found that the Appellant bought Pupil A high value gifts, including a GPS watch, which had caused an imbalance in Pupil A's relationship with his family. The PCP further found that the Appellant gave Pupil A lifts in his car on many occasions, with no parental consent in advance, contrary to the College's policy, and communicated with Pupil A through numerous calls and text messages, again contrary to the College's policy. The Appellant also took Pupil A to the cinema without his parents' consent. The PCP found that the Appellant arranged and paid for counselling for Pupil A on College premises without Pupil A's parents' consent, and without informing the College. In so acting, the PCP found, the Appellant failed to adhere to basic safeguarding responsibilities, such as making sure that the counsellor was DBS checked. Finally, the PCP found that the Appellant maintained contact with Pupil A even when instructed not to do so as a reasonable condition of his suspension during the College's investigation.

13. So far as Pupils B and C were concerned, it was alleged that they were members (along with Pupil A) of a small group of pupils who were encouraged to spend time in the Appellant's office in the College and who were under his influence. The PCP found that the Appellant had communicated with Pupil B by text message and Snapchat, contrary to College policies, and had told them to delete the messages. The PCP found that the Appellant had bought gifts for Pupils B and C, including a US Navy Seal knife for Pupil B, and books for Pupils B and C. The PCP further found that the Appellant had taken Pupils B and C (along with Pupil A) on a trip to the New Forest, without making clear to the parents that no other adults would be present, and it was not an official College trip, contrary to College policies. The PCP also found that the Appellant bought alcohol for Pupils B and C whilst on the trip to the New Forest, without their parents' consent.
14. The PCP also found that the Appellant organised field trips and/or extra-curricular activities without the College's knowledge and without following proper procedures (such as undertaking risk assessments, and obtaining parental consents).
15. The PCP's findings against the Appellant included findings of dishonesty. These were that (1) the Appellant had allowed Pupil A's parents to think that trips away were official College trips, when this was not the case; (2) the Appellant had worked to create an illusion in the minds of the parents of Pupil A to the effect that the trips that he had arranged with Pupil A were official trips arranged by the College; and (3) the Appellant had acted dishonestly in concealing the purpose and details of the arrangements for Pupil A's counselling from his parents and the College.
16. It is important to record, however, that the PCP did not find that there was a sexual motive in the actions of the Appellant.
17. There were originally six grounds of appeal. These were that:
  - i) The PCP erred in law in purporting to apply the provisions of a document issued by the TRA, "Teacher Misconduct: disciplinary procedures for the teaching profession." ("the TRA Procedures Document"), when taking case management decisions. The Appellant says that this was an error of law, because the TRA and/or the Secretary of State had no power to issue the document, and it was wrong for the PCP to have regard to it;

- ii) The PCP is not “independent” as required by Article 6 of the European Convention on Human Rights, which is incorporated into domestic law by Schedule 1 to the Human Rights Act 1998;
  - iii) The PCP breached the Appellant’s right to attend the hearing, because it turned down his request on 22 March 2019 to give evidence to the hearing to Skype. The Appellant submits that this was in breach of the right to attend given by regulation 9 of the 2012 Regulations, and/or of his right to a fair hearing under Article 6, and/or of his right under Article 6 to give evidence by Skype if he was not in a position to attend the hearing;
  - iv) The PCP erred in law declining to accede to the Appellant’s application to adjourn the hearing. As stated above, this application was made on 15 March 2019, the last working day before the hearing was due to begin, and was based upon the Appellant’s contention that the College had failed to comply with disclosure directions that had been made by the TRA;
  - v) The PCP erred in law in failing to make a determination on the Appellant’s application, made on 22 March 2019, to admit a witness statement from the College Nurse Manager, Ms Gill O’Sullivan, and from the Appellant himself, and/or in failing to give adequate reasons for the PCP’s refusal to admit the witness statements; and
  - vi) For the above reasons, the Secretary of State acted unlawfully in purporting to have regard to the PCC’s recommendations by imposing the Prohibition Order without a review period.
18. At the hearing, Mr Clayton QC, on behalf of the Appellant, withdrew ground ii). To avoid confusion, however, I will continue to refer to the remaining grounds by their original numbering, as that was how they were referred to at the hearing.
19. It will be noted that this appeal is not a direct challenge to the findings of fact made by the PCP on the basis that they were irrational or perverse, in light of the evidence before the PCP. Nor is it alleged that the PCP misdirected itself as regards the legal test it was required to apply when deciding whether to recommend a Prohibition Order without a review period. Rather, the grounds of appeal are challenges to the lawfulness of procedural decisions, namely the decisions not to adjourn the hearing, not to permit the Appellant to give evidence from Canada by Skype, and not to admit the witness statements of Ms O’Sullivan and the Appellant himself. The ground of appeal which is of the widest general significance is the Appellant’s contention that it was unlawful for the PCP to have regard to the TRA Procedures Document when taking procedural decisions, and that this failure vitiated the findings of fact and recommendation by the PCP. If this is right, then it would mean, potentially, that any decision by a PCP which has had regard to the TRA Procedures Document in making procedural decisions will be unlawful and will be liable to be set aside on appeal.

### **The structure of this judgment**

20. The structure of the remainder of this judgment will be as follows: First, I will set out the statutory framework, and will refer to the key relevant parts of the TRA Procedures Document. I will then consider the role of the Administrative Court in an

appeal such as this, which is brought under regulation 17 of the 2012 Regulations. Next, I will set out the passages from the PCP's decision which set out the procedural decisions which form the basis for the Appellant's challenge. I will then deal in turn with each of the five remaining grounds of appeal.

### **The statutory frame work**

#### **The Education Act 2002**

21. With effect from 1 April 2012, the Secretary of State was given responsibility for regulating the teaching profession in England and to hold a list of teachers who have been prohibited from teaching. This was previously the responsibility of the General Teaching Council for England.
22. Section 141B of the Education Act 2002 ("the 2002 Act") was added by the Education Act 2011. This provides, in relevant part:

#### **"141B Investigation of disciplinary cases by Secretary of State**

(1) The Secretary of State may investigate a case where an allegation is referred to the Secretary of State that a person to whom this section applies—

(a) may be guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute,  
....

(2) Where the Secretary of State finds on an investigation of a case under subsection (1) that there is a case to answer, the Secretary of State must decide whether to make a prohibition order in respect of the person.

(3) Schedule 11A (regulations about decisions under subsection (2)) has effect."

23. A "Prohibition Order" is defined in section 141B(4) to mean an order prohibiting the person to whom it relates from carrying out teaching work. Section 141C requires the Secretary of State to keep a list containing the names of persons in relation to whom a Prohibition Order has effect.
24. Paragraph 1 of Schedule 11A to the 2002 Act provides that:  

"1. The Secretary of State must make regulations in accordance with the following provisions of this Schedule."
25. Paragraph 2(1) of Schedule 11A provides, in relevant part:

“2(1) Regulations under paragraph 1 must make provision about the procedure to be followed by the Secretary of State in reaching a decision under section 141B(2)

(2) The regulations must not require a person to give evidence or produce any document or other material evidence which the person could not be compelled to give or produce in civil proceedings in any court in England and Wales”

26. Paragraph 5 deals with appeals. It states, again in relevant part:

“15(1) Regulations under paragraph 1 must make provision conferring on a person to whom a prohibition order relates a right to appeal against the order to the High Court.....

(3) No appeal lies from any decision of the Court on such an appeal.”

27. Paragraph 6 provides:

“6(1) Regulations under paragraph 1 may make incidental and supplemental provision, including provision-

....

(c) authorising the delegation of functions conferred by virtue of this Schedule and the determination of matters by any person or persons specified in the regulations.”

### The 2012 Regulations

28. Regulation 5 of the 2012 Regulations makes provision for the first stage in the process, at which the Secretary of State decides whether there is a case to answer which should be considered by a PCP. No challenge is made to this stage in the Appellant’s case.

29. Regulation 6(1) provides that:

“(1) Where the Secretary of State decides under regulation 5(4) that a case should be considered by a professional conduct panel, the Secretary of State must appoint such a panel in accordance with paragraph (2) to consider the case.”

30. It is obligatory, therefore, for the case to be considered by a PCP before the Secretary of State makes a final decision.

31. Regulation 6(2) provides that a PCP must include at least three persons, comprising one or more teachers or persons who have been teachers within the last five years and one or more other persons.

32. Regulation 7 provides:

**“7.— Proceedings of a professional conduct panel”**

(1) A professional conduct panel must consider cases referred to it by the Secretary of State in accordance with paragraphs (2) to (5) and regulations 9 to 11.

(2) Subject to paragraph (3), a professional conduct panel must determine all cases following a hearing.

(3) A professional conduct panel may determine a case without a hearing at the written request of the teacher who is the subject of the case.

(4) Where the professional conduct panel does not find the case proved, the Secretary of State must at the request of the teacher publish a statement to that effect.

(5) Where a professional conduct panel finds the teacher —

(a) to have been guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute;  
...

the panel must make a recommendation to the Secretary of State as to whether a prohibition order should be made.

33. Regulation 8(1) provides:

“8(1) The Secretary of State must consider any recommendation made by a [PCP] before deciding whether to make a prohibition order.”

34. Regulation 8(2) provides that, when deciding to make a Prohibition Order, the Secretary of State must decide whether or not an application may be made for a review of the Order.

35. Regulation 9, which is relied upon by the Appellant, states:

**“9. Entitlement to appear and be represented at hearings.**

A teacher who is the subject of a case may appear and make oral representations, and be represented by any person, at any hearing at which the case is considered.”

36. Other regulations provide that the Secretary of State or the PCP may require any person to attend to give evidence or produce documents or other material evidence (regulation 10), that PCP hearings must take place in public (regulation 11), that the PCP may require witnesses to give evidence on oath or affirmation (regulation 12), and that nothing in the regulations should be taken to require any person to give evidence or produce any document or other material evidence which the person could

not be compelled to give or produced in civil proceedings in any court in England and Wales.

37. In practice, the Secretary of State's functions in relation to the regulatory system concerned with teachers' misconduct are carried out by the TRA, which is an executive agency of the Department for Education. The TRA therefore acts on behalf of the Secretary of State. I was provided with a witness statement from Mr Alan Meyrick, the Chief Executive and Accounting Officer of the TRA, which described his role and the role of the TRA.
38. Regulation 17 of the 2012 Regulations provides for appeals. It states, "A person in relation to whom a prohibition order is made may appeal to the High Court within 28 days of the date on which notice of the order is served on that person." The Appellant filed his notice of appeal within the 28 day period.

#### The TRA Procedures Document

39. This document, which is published by the TRA is updated from time to time (more or less on an annual basis). The most recent version is dated April 2018.
40. Paragraph 1.1 of the TRA Procedures Document states that "This document sets out the procedures for the regulatory system, relating to teacher misconduct, in operation from 1 April 2012."
41. Paragraph 1.2 states:

"This document aims to inform

  - Teachers;
  - Hearing witnesses; and
  - Employers or employment or supply agencies

of what will happen at each stage of the investigation, hearing and decision-making processes. The information may also be of interest to members of the public and other organisations who may consider making a referral to the Secretary of State."
42. Paragraph 1.4 states:

"Any procedures or requirements set out in these Disciplinary Procedures, except matters subject to the Regulations, may be waived or varied where there is an agreement between the teacher or the teacher's representative and the presenting officer, provided that such a waiver or variation is not contrary to the interests of justice."
43. The TRA Procedures Document covers all four stages of the process, including the "case to answer" stage and the final decision-making by the Secretary of State, as well as the stages involving the PCP. The general structure of the Document is that it

starts with a broad and general summary, before providing more detailed descriptions of the procedures later in the document.

44. Much of the TRA Procedures Document consists of a general overview of the processes, informing participants and interested parties of what to expect, and, in particular, what to expect from the TRA. There is reference to deadlines and/or anticipated time scales. So, amongst many other examples, paragraph 2.8 states that the TRA will aim to make a decision within three working days of a referral as to whether to start an investigation, and paragraph 2.14 states that a teacher should ensure that any representations as to why an Interim Prohibition Order should be lifted should be received by the TRA within seven working days of the teacher being informed that the TRA is considering imposing an Interim Prohibition Order.
45. So far as the proceedings of the PCPs are concerned, the TRA Procedures Documents provides a substantial amount of detail as regards what procedures should be followed. So, for example, provision is made for the appointment of a Legal Adviser to the PCP, who may, inter alia, provide assistance to an unrepresented teacher about the relevant procedures (paras 4.5-4.9); and for the appointment of a Presenting Officer to act on behalf of the TRA (para 4.10). In practice, both the Legal Adviser and the Presenting Officers will be solicitors from (different) external law firms. The Document states that, at least eight weeks before the hearing date, the TRA will send a Notice of Proceedings to the teacher which will, inter alia, notify the teacher of the time and date of the hearing, specify the details of the specific allegations against the teacher, identify the witnesses to be called by the Presenting Officer, and enclose the documentary evidence relied upon (paras 4.11-4.12). The Document then states that teachers have three weeks to provide a written response, in which they should, inter alia, provide the names of witnesses (para 4.16). They may however file further evidence up to four weeks before the start of the hearing (para 4.20).
46. Paragraph 4.17 deals with burden of proof (on the Presenting Officer) and the standard of proof (the normal civil standard).
47. Under the heading, “Admissibility of evidence”, paragraphs 4.17 and 4.18 state:

“4.18 The panel may admit any evidence, where it is fair to do so, which may reasonably be considered to be relevant to the case.”

4.19. Evidence not disclosed in accordance with paragraph 4.20 will be admitted only with the permission of the [PCP] at the hearing.
48. Paragraphs 4.27 to 4.30 deal with what happens if a teacher does not attend the hearing. They provide that the Chair must request evidence that the Notice of Proceedings were sent to the teacher in accordance with para 4.11, and enquire whether any reasons for the teacher’s absence have been communicated to the TRA or the presenting officer. If the PCP is not satisfied that the requirements of para 4.11 have been complied with, the PCP must adjourn the hearing. If the PCP is satisfied that the requirements of para 4.11 have been complied with, the PCP will take into account any representations from the Presenting Officer and the teacher and then the

PCP may proceed with the hearing in the absence of the teacher or adjourn the hearing.

49. Paras 4.31 to 4.35 deal with postponements and adjournment. They state that, before the first day of a hearing, the TRA may postpone the hearing until such time and date as it thinks fit. Para 4.31 states that “This may be because further evidence has been submitted by the teacher or Presenting Officer or for some other reason.” Similarly, where a hearing has already commenced, para 4.32 permits a PCP to adjourn the hearing further until such time and date as it thinks fit.
50. Para 4.37 makes provision for the parties to agree directions in advance of a hearing, and para 4.40 says that, if agreement cannot be reached, one of the parties may apply to the PCP for pre-hearing directions.
51. Paras 4.49-4.56 deal with procedure at the hearing, dealing with such matters as opening and closing statements, and amendments to allegations.
52. Para 4.54 state that:

“The [PCP] may at any stage of the proceedings, where it considers it fair and appropriate:

  - Adjourn the case; or
  - Discontinue the proceedings.”
53. The TRA Procedures Document also deals with witnesses, in paras 4.62 to 4.72. Paragraph 4.62 says that evidence will be given by oath or affirmation. Paragraph 4.67 says that “Witnesses may be recalled at the discretion of the [PCP].” Paragraphs 4.71-4.72 deals with special measures that can be put in place for children and vulnerable witnesses. The PCP must adopt such measures as the consider necessary to safeguard the interests of a child or a vulnerable witness.

### **The role of the Administrative Court in an appeal such as this**

54. In his oral submissions, Mr Clayton QC invited me to quash the decision of the PCP and/or the Secretary of State and to consider making a declaration that it is unlawful for a PCP to have regard to the TRA Procedures Document. Mr Steele, for the Secretary of State, submitted that I do not have jurisdiction to make such orders.
55. In my judgment, Mr Steele is plainly correct. An appeal by a teacher who has been made the subject of a Prohibition Order is made by way of a statutory appeal under CPR 52. This is not a claim for judicial review in which the whole range of public law remedies are potentially available. Nevertheless, if Mr Clayton is right that the PCP acted unlawfully in having regard to the TRA Procedures Document, or otherwise acted unlawfully in relation to its procedural decisions, the right course of action would be to allow the appeal and to remit the case for reconsideration. In practice this would mean that there would have to be a new hearing before a PCP which would look at the allegations afresh and would make its own findings of fact and decide whether to make a recommendation for a Prohibition Order, with or without a review period. If the second PCP made a recommendation for a Prohibition

Order, the Secretary of State would then have to consider that recommendation and decide whether to make an Order.

56. CPR 52.21 applies to statutory appeals such as this. CPR 52.21 provides, in relevant part:

**“52.21**

(1) Every appeal will be limited to a review of the decision of the lower court unless—

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

(2) Unless it orders otherwise, the appeal court will not receive—

(a) oral evidence; or

(b) evidence which was not before the lower court.

(3) The appeal court will allow an appeal where the decision of the lower court was—

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence.”

57. There is no practice direction which provides that an appeal under regulation 17 of the 2012 Regulations should be made by way of rehearing, and there was no suggestion on behalf of the Appellant that the interests of justice require a rehearing to be held. Therefore, this appeal is by way of a review.

58. CPR 52.21 provides that an appeal may succeed on the basis that the lower court’s decision was wrong or was unjust because of a serious procedural or other irregularity of the proceedings in the lower court. It is not in dispute, and it is well-established, that the appellate court should not allow an appeal merely because the appellate court would have taken a different decision in relation to the procedural issues that are being challenged. That would not mean, of itself, that the lower court or panel’s procedures were unjust or that there was a serious procedural irregularity. The appellate court cannot simply substitute its view for the view of the lower court or panel. Procedural decisions such as whether to adjourn, or to admit witness statements, or to permit evidence to be given at a late stage of the hearing by Skype are matters for the discretion of the PCP. Unless the PCP has misdirected itself in

law, the appellate court will only interfere with the exercise of such a discretion if it exceeds the generous ambit within which reasonable disagreement is impossible. See **General Medical Council v Hayat** [2018] EWCA Civ 2796, at paragraphs 66-68, and the cases referred to in those paragraphs. Another way of putting the matter, as the Court of Appeal recognised in **Hayat**, is that the appellate court should only allow the appeal if the first instance decision was “plainly wrong”, because the court or panel below has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible. This is, of course, often referred to as a “perversity” challenge.

59. Mr Clayton QC emphasised that his client’s appeal was an appeal on a point of law, on the basis that the PCP had erred in law in respect of the procedural decisions that it had taken. It was his submission that the procedural decisions taken by the PCP were contrary to law because they were contrary to the domestic statutory provisions and were also contrary to Art 6. Mr Clayton QC was at pains to stress that his submissions were not based on the contention that the relevant decisions of the PCP were perverse. At times during his oral submissions, however, as I will explain, Mr Clayton QC’s criticisms became essentially a perversity challenge.
60. As stated above, the present appeal is not an appeal “on the merits” in the traditional sense. The Appellant was not contending that the findings of fact or the recommendations of the PCP were wrong in light of the evidence before the PCP. Rather, he submits that the PCP erred in law in failing to adjourn and in failing to admit additional evidence, and, for that reason, the appeal should be allowed and the case remitted to a new PCP. However, the Appellant does indeed believe that the findings of fact (to the extent that they were not admitted) and the recommendations of the PCP were wrong, and that the Secretary of State should not have made a Prohibition Order without scope for review. The Appellant’s objective, by means of this appeal, is to obtain a reconsideration of the decision to impose the Prohibition Order in the hope and expectation that the PCP and the Secretary of State will come to a different conclusion if they reconsider the matter without procedural irregularity.

### **The relevant parts of the PCP’s decision**

61. It is worth setting out in full the parts of the PCP’s decision which deal with the procedural decisions that are challenged by the Appellant.
62. The PCP dealt with the question whether it should proceed in the Appellant’s absence, and with the other procedural issues, as follows:

#### **“Proceeding in absence**

The panel considered an application from the presenting officer to proceed in the absence of Dr Jones.

The panel was satisfied that TRA has complied with the service requirements of regulation 19 a to c of Teachers’ Disciplinary (England) Regulations 2012 (“the Regulations”).

The panel was also satisfied that the Notice of Proceedings complied with paragraphs 4.11 and 4.12 of the Teacher

Misconduct: Disciplinary Procedures for the Teaching Profession (“the Procedures”).

The panel exercised its discretion under paragraph 4.29 of the Procedures to proceed with the hearing in the absence of the teacher.

The panel understood that its discretion to commence a hearing in the absence of the teacher has to be exercised with the utmost care and caution, and that its discretion is a severely constrained one.

In making its decision, the panel noted that the teacher may waive his right to participate in the hearing. The panel has taken account of the various factors drawn to its attention from the case of *R v Jones* [2003] 1 AC 1. The panel further noted that sufficient notice (8 weeks) of the proceedings had been given, that the Notice of Proceedings had been sent to the legal representative of Dr Jones who was instructed to take service and previous correspondence with the TRA indicated that the teacher had waived his right to be present at the hearing in the knowledge of when and where the hearing was to take place.

The panel has had regard to the requirement that it is only in rare and exceptional circumstances that the decision should be taken in favour of the hearing taking place. Given that these proceedings commenced in 2015 when a referral to the TRA (then NCTL) was made, the panel determined that there was a strong public interest in proceeding without further delay. The panel saw no indication that an adjournment might result in the teacher attending the hearing.

The panel has had regard to the extent of the disadvantage to the teacher not being able to give his account of events, having regard to the nature of the evidence against him. The panel has had the benefit of contemporaneous documents previously submitted by the teacher and a statement addressing the allegations and proffering Dr Jones’s response. The panel was able to ascertain lines of the defence and tested the evidence in questioning witnesses. The panel did not identify any significant gaps in the documentary evidence. Further, the panel was also able to exercise vigilance in making its decision, drawing on its experience and taking into account the degree of risk of the panel reaching the wrong decision as a result of not having heard the teacher’s account.

The panel also noted that there were a considerable number of witnesses (10) due to give evidence at the hearing and that it would be inconvenient and distressing for them to return again.

The panel had regard to the seriousness of this case, and the potential consequences for the teacher and has accepted that

fairness to the teacher is of prime importance. However, it considers that in light of the teacher's waiver of his right to appear; by taking such measures referred to above to address that unfairness insofar as is possible; and taking account of the inconvenience an adjournment would cause to the witnesses; that on balance, these are serious allegations and the public interest in this hearing proceeding within a reasonable time is in favour of the hearing continuing.

### **“Adjournment Application**

The panel considered a written application on behalf of the teacher for adjournment of the hearing on the ground that the TRA [this was, I think, a typo and should have referred to “the College”] had failed to fully comply with the directions for disclosure made on behalf of the Secretary of State dated 22 February 2019.

The panel heard representations on Dr Jones's application from the presenting officer and noted the witness statement of individual A [the College's Human Resources manager] and its exhibits. The panel was persuaded that the College and the TRA had taken all reasonable steps to comply with the disclosure direction.

The panel noted that once staff left the College, their emails were archived in an encrypted password-protected file. The panel heard that the College was not able to ascertain the password. The panel specifically noted that the College subsequently had sought the services of an IT expert,<sup>7</sup> Safe. The panel accepted the written evidence in Individual A's statement that the documents requested were irretrievable by commercially available means. The panel accepted Individual A's evidence that the encryption could only probably be deciphered by law enforcement agencies.

The panel therefore refused the Teacher's Application on the grounds that the panel considered that the TRA and the College had complied with the direction for disclosure. The information which it was not able to obtain could not be said to be held by the College as it was stored on an encrypted server which was not accessible. The panel therefore determined that on the evidence presented to it, and adjournment would not facilitate any further disclosure.”

.....

“Application from Dr Jones

On the afternoon of 22 March 2019, the panel received notice of an application from Dr Jones via the presenting officer. The panel was told as a result of its earlier decision to refuse Dr Jones's application to adjourn the hearing that he now wished to: give evidence to the panel through video-link, provide an updated witness statement and provide two further witness statements from a former member of College staff and the former College nurse.

Following representations from the presenting officer and having received legal advice, the panel determined to refuse this application. The panel was minded of its power under paragraph 4.18 of the Procedures, to admit any evidence, where it is fair to do so, which may reasonably be considered to be relevant to the case.

The panel was minded of all of the reasons that it had considered in taking its decision to proceed in the absence of Dr Jones at the commencement of the hearing. The panel determined that it had taken sufficient steps to mitigate the risk of it coming to the wrong conclusion on the facts due to the absence of the teacher. For example, the panel had taken the necessary steps to ascertain Dr Jones's lines of defence on the basis of the documents Dr Jones had previously submitted. The panel had ensured that it put questions to those witnesses which Dr Jones, had he chosen to engage with proceedings, may have put to them.

The panel was minded that Dr Jones had made the application after the TRA had closed its case. The TRA had called 10 witnesses in support of its case and would not be able to put Dr Jones's updated statement to those witnesses. The panel was mindful of its obligations to ensure fairness to Dr Jones but also to consider fairness to the TRA. The panel considered that it would create an unreasonable unfairness against the TRA should it allow the application."

**Ground i): the PCP erred in law by having regard to the TRA Procedures Document**

63. On behalf of the Appellant, Mr Clayton QC submitted that the Secretary of State had no power to determine procedures for PCPs and so that it had been ultra vires for the Secretary of State to issue the TRA Procedures Document through his Executive Agency, the TRA. Mr Clayton QC pointed out that the passages from the PCP's decision, set out above, showed that the PCP had regard to the contents of the TRA Procedures Document. He submitted that this meant that the PCP had erred in law and that this meant, in turn, that the Secretary of State's decision in relation to the Prohibition Order could not stand and that the appeal must be allowed.
64. The first stage of Mr Clayton QC's argument on Ground 1, therefore, is concerned with the vires to issue the TRA Procedures Document. Mr Clayton QC submitted that the Secretary of State had been given power by paragraph 2(1) of Schedule 11A to the

2002 Act to lay down, in delegated legislation, procedural rules which had to be followed by PCPs. The Secretary of State had done so, in the form of regulations 9-12 of the 2012 Regulations. There was no further express power, either in the 2002 Act, as amended, or the 2012 Regulations, for the Secretary of State, or the TRA on his behalf, to issue further procedural rules which were not laid down in the 2012 Regulations. Moreover, Mr Clayton QC submitted that where Parliament has legislated in relation to a particular field, it is not permissible for a Government Minister to cover the same ground by issuing non-statutory rules or guidance. Mr Clayton QC submitted that the Secretary of State therefore did not have vires to cause to the TRA Procedure Regulations to be issued and applied to PCPs. In so far as the Secretary of State purported to do so by exercise of prerogative powers, this was ultra vires, because of the well-known principle that the Executive cannot use prerogative powers to overcome restrictions in statutory powers that cover the same ground. If the Secretary of State was not using prerogative powers, but was using general common law powers, then the same principle applied: the only way in which the Secretary of State, or the TRA on his behalf, could impose procedural rules upon PCPs was by setting them out in delegated legislation made under the power conferred by paragraph 2(1) of Schedule 11A to the 2002 Act.

65. There were three limbs to this part of Mr Clayton QC's argument on Ground i). The first was that any prerogative power the Secretary of State would otherwise have to issue the TRA Procedures Document was abrogated because Parliament had, by the 2002 Act, given the Secretary of State the power to issue procedural rules by means of delegated legislation, and that this meant that it was ultra vires to issue such procedural rules except in that manner. This limb of the argument was advanced on the footing that the power to issue the non-statutory procedural rules would be derived from the prerogative. The second limb to the argument addressed the position if there is no prerogative power to issue the TRA Procedures Document. If that is the position, Mr Clayton QC submitted, then there is a more fundamental problem, namely that, since there was no specific statutory power to issue procedural rules of the type that are set out in the TRA Procedures Document, the Secretary of State simply had no vires to do so. The third limb was this: In the alternative, if there was in principle a common law or "third source" power to issue non-statutory procedural rules, then such a power had been extinguished by Parliament's decision, embodied in paragraph 2(1) of Schedule 11A to the 2002 Act, that any procedural rules should be set out in a statutory instrument.
66. For the first limb, Mr Clayton QC relies upon a number of authorities on prerogative powers. The first is the well-known case of **Attorney-General v De Keyser's Royal Hotel Ltd** [1920] AC 508 (HL). This case concerned the requisition of premises for military purposes during the First World War. The Respondents contended that the Government was obliged to pay compensation to the landowner, pursuant to the terms of the Defence Act 1842. The Government said that it did not have to pay compensation, because it was not acting under that Act, but under the Royal prerogative. The House of Lords held that it was not possible for the Government to use prerogative powers to do something authorised by statute in order to side-step conditions that were imposed by the statute. Lord Atkinson said, at page 540:

“...after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be

done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.”

See, to like effect, Lord Dunedin at 526, Lord Moulton at 554, Lord Sumner at 561, and Lord Parmoor at 575.

67. Mr Clayton QC pointed out that the principle set out in the **De Keyser** case has much more recently been applied by the House of Lords in **R v Secretary of State for the Home Department, ex p Fire Brigades Union** [1995] 2 AC 513, and by the Supreme Court in **R (Miller) v Secretary of State for Exiting the EU** [2018] AC 61, at 50-51 (“**Miller 1**”), and **R (Miller) v Prime Minister** [2019] 3 WLR 589, at 41.
68. Mr Clayton QC said that it follows from these authorities that any prerogative power to issue non-statutory procedural rules for PCPs was extinguished by the creation of a statutory power to do so.
69. If, on the other hand, there was no prerogative power to issue such non-statutory procedural rules, then, Mr Clayton QC says, it followed that there was no power at all. He accepts that the Court of Appeal has held that the powers of the Secretary of State are not confined to those conferred by statute or prerogative, but extend, subject to any relevant statutory or public law constraints, and to the competing rights of other parties, to anything which could be done by a natural person. This is set out in **R v Secretary of State for Health, ex p C** [2000] 1 ECR 471 (CA), per Hale LJ, and in **Shrewsbury and Atcham BC v Secretary of State** [2008] 3 All ER 548 (CA), at paras 44-49, per Carnwath LJ, and at paras 72-74, per Richards LJ. This is sometimes referred to as the “third source” or common law power, which is in addition to statute and the prerogative.
70. However, submitted Mr Clayton QC, the scope of the “third source” power is narrowly constrained. He pointed out that, in the **Shrewsbury and Atcham** case, Carnwath LJ expressed the view that the “third source” category applies only to necessary and incidental parts of the ordinary business of central government (judgment, para 49). Carnwath LJ took the view that any such additional vires applies only to the exercise of “ancillary powers, necessary for the carrying out of any substantive governmental (or indeed non-governmental) functions, whether statutory, corporate or common law” (para 45). He referred to the examples of the power to make contracts, employ servants and convey land. Carnwath LJ thought that “third source” powers could only cover things done for the public benefit or for identifiably governmental purposes (see para 49). Mr Clayton QC accepted that Richards LJ in **Shrewsbury and Atcham** took a broader view, and expressed the opinion that the “third source” power was the source of the power to exercise the ordinary business of government, and should not be qualified by requiring that they be exercised for the public benefit or for identifiably governmental purposes (see paragraph 73). This divergence of views was noted by the Court of Appeal in **R(W) v Health Secretary** [2016] 1 WLR 698, at paras 68-70. The third judge in the **Shrewsbury and Atcham** case, Waller LJ, did not express a firm view on the matter, though he said that he instinctively favoured some constraint on the powers by reference to the duty to act only for the public benefit (para 80).

71. In the event, there was no need to resolve this difference of opinion in the **Shrewsbury and Atcham** case itself. The case concerned the lawfulness of certain preparatory steps which had been taken in relation to local government reorganisation before the Act authorising the reorganisation was enacted. The Court of Appeal held that the preparatory acts had been retrospectively approved when the Act was passed, and it was therefore unnecessary for the Court to decide whether, absent the Act, there would have been common law powers to undertake the preparatory steps.
72. Mr Clayton QC submitted that, whatever the scope of the “third source” power might be, it does not extend to permit the Secretary of State to impose non-statutory procedural rules for PCPs.
73. The final stage in this part of Mr Clayton QC’s argument in relation to Ground i) was that even if, contrary to his previous submission, there exists in principle a common law “third source” power for the Secretary of State to issue the TRA Procedures Document, such a power has been constrained by paragraph 2(1) of Schedule 11A to the 2002 Act, which confers a statutory power to do so. It was not in dispute in **Shrewsbury and Atcham** that any “third source” powers may be excluded expressly or impliedly by statute, or that their exercise may be limited by statute (see para 50, per Carnwath LJ, and para 75, per Richards LJ). Mr Clayton QC submitted, therefore, that even if there is, in principle, a “third source” power to issue procedural rules to PCPs, this has been abrogated by paragraph 2(1) of Schedule 11 A.
74. Accordingly, Mr Clayton QC submitted that the Secretary of State and the TRA had no power to issue procedural directions for PCPs. He submitted that it is clear from the PCP’s decision in the present case that the PCP had regard to the TRA Procedures Document. It is referred to at two places in the passage from the decision which is set out above. Mr Clayton QC said that this automatically and inevitably invalidated and rendered unlawful the procedural decisions that were taken by the PCP and which are the subject-matter of this appeal. He said that it is no answer to say that the decisions might have been the same even if the PCP had not taken account of the TRA Procedures Document. The very fact that the PCP took account of directions which the Secretary of State and the TRA did not have vires to make meant that the decisions cannot stand and that the appeal should be allowed.

### **Discussion and conclusions on Ground i)**

#### **Did the Secretary of State act unlawfully in issuing the TRA Procedures Document?**

75. This question needs to be addressed in two stages: (1) In principle, and leaving aside any potential statutory restrictions, did the Secretary of State have a power to lay down procedural rules/guidance for the PCPs?; and (2), if so, was that power abrogated by the statutory duty to make provision about the procedure to be followed by the Secretary of State in reaching a decision under section 141B(2) of the 2002 Act?

#### **In principle, and leaving aside any potential statutory restrictions, did the Secretary of State have a power to lay down procedural rules/guidance for PCPs?**

76. In my judgment, the answer is plainly “yes”.

77. The Appellant does not dispute that the Secretary of State was entitled to set up independent panels to make findings of fact and recommendations in teachers' disciplinary cases. Provision is made for this in the 2012 Regulations, and the Secretary of State was authorised to make the 2012 Regulations by paragraph 2(1) of Schedule 11A to the 2002 Act. Paragraph 6(1)(c) of Schedule 11A specifically permits the Secretary of State to authorise the delegation of functions conferred by virtue of Schedule 11A and the determination of matters by any person or persons specified in the Regulations. The functions conferred by Schedule 11A included the determination of teachers' disciplinary cases.
78. Having been granted the power to set up PCPs, it is clear, in my view, that the Secretary of State has the ancillary power to give guidance and directions to the PCPs about the procedures that they should follow, and then to publish them.
79. The starting-point is that it is plainly of great public benefit for the Secretary of State to issue a document such as the TRA Procedures Document, which provides procedural guidance and directions. It is plainly in the interests of justice, because it enables the Secretary of State to promote consistency of decision-making amongst different PCPs. It enables the Secretary of State to emphasise to PCPs that they should seek to act fairly, efficiently, and in the interests of justice in the way that they approach decisions. It is a safeguard. The fact that the TRA Procedures Document is published and is available to teachers, witnesses and the general public promotes open justice and also improves efficiency, as all concerned in the process should be aware of the expectations imposed upon them.
80. I have summarised the contents of the TRA Procedures Document earlier in this judgment. In essence, it does four main things. First, the Document sets out a detailed procedure that should be followed by PCPs in order to ensure that they operate fairly, efficiently, and consistently. Second, the Document provides information to PCPs and, perhaps more importantly, to teachers and witnesses, about how the activities of PCPs will be carried out, and what is expected of participants. Third, the Document provides a number of safeguards for teachers, by requiring PCPs to act fairly and by imposing time limits for the service of documents etc which, in the main, impose obligations on the TRA and on Presenting Officers, rather than upon teachers (although there are also one or two time-limits which "bite" upon teachers and their representatives). Finally, the Document makes clear that PCPs retain a discretion to depart from the normal arrangements, and to waive compliance with time-scales etc, if it is in the interests of justice to do so.
81. It might be said that some of the contents of the TRA Procedures Document consists of stating the obvious, with its emphasis on fairness and on PCPs acting in the interests of justice, but it is nonetheless valuable that this has been set out in writing: it is a useful reminder to PCPs and may well provide reassurance to participants in the process who are not used to legal or quasi-legal proceedings and who may not regard it as self-evident that these principles will underpin the process.
82. The value of guidance and directions such as can be found in the TRA Procedures Document is, in my judgment, obvious, but it can be tested by considering what the position would be if the Secretary of State had not issued a document such as this. If PCPs were set up, but were not given any steer at all about what, if any, procedural rules they were to apply, and what principles they were to follow when taking

procedural decisions, this would be a recipe for chaos and potential unfairness. There would be the obvious risk that different PCPs would apply different and inconsistent procedural rules, and there would be risk that bespoke procedural rules would lead to unfairness. In all common sense, the Secretary of State could not just set up PCPs and then give no guidance or direction about the procedural rules that should be followed.

83. I should add that Mr Clayton QC did not submit that any of the detailed provisions of the TRA Procedures Document was unfair or otherwise open to criticism. He did not say, for example, that it was wrong in principle to lay down deadlines for the provision of information or the service of document (which deadlines could be amended or waived if the interests of justice required it).
84. In light of the above, in my judgment, three things are clear. The first is that the issuing of guidance and directions in the form of a document such as the TRA Procedures Document was a necessary ancillary step to the setting up of PCPs themselves. You could not sensibly have one without the other. Second, by issuing the TRA Procedures Document, the Secretary of State acted in the public benefit. It could not be said, in particular, that the procedures laid down in the Document were slanted in favour of the TRA, or were unfair on teachers who were facing disciplinary action. Third, the issuing of the TRA Procedures Document was for an identifiably governmental purpose. Parliament had assigned responsibility for disciplinary action for teachers, and for the keeping of a list of prohibited teachers, to the Secretary of State. This is a classic “governmental” function.
85. It follows, in my judgment that, even absent an express statutory authorisation granting the power to issues procedural guidance and directions for PCPs, the Secretary of State has a common law or “third source” power to do so. It is ancillary to his statutory functions, it is for the public benefit, and it is for an identifiably governmental purpose. It is the sort of thing that could be done by a natural person. This means that, even if the narrower version of the scope of “third source” powers, as set out in the judgment of Carnwath LJ in the **Shrewsbury and Atcham** case, is the correct one, it is clear, in my judgment, that (leaving aside any restriction imposed expressly or impliedly by statute) the Secretary of State has a residual ministerial power to issue the TRA Procedures Document.
86. There is a parallel with the case of **R(W) v Health Secretary** [2016] 1 WLR 698 (CA). In that case, the Court of Appeal held that the Health Secretary had power to pass on information to the Home Office about foreign nationals who had failed to pay debts owed for NHS medical treatment. This was relevant for Home Office purposes because it might affect whether leave to enter or remain was granted. Even though there was no specific statutory power to pass on this information to the Home Office, the Court of Appeal held that it fell within the residual category of ministerial power that was not dependent on either statute or prerogative.
87. In my view, the power under consideration in the present case is part of the residual ministerial “third source” power. It is not a prerogative power. This is something that is incidental to a power that has been granted to the Secretary of State, and it is far removed from the traditional areas of prerogative power, such as the power to promote the defence of the realm or to conduct relations with foreign states.

Is this power abrogated by the Secretary of State's statutory duty to make provision about the procedure to be followed in reaching a decision about whether there has been unacceptable professional conduct and, if so whether to impose a prohibition order?

88. In my judgment, the answer is, plainly, “no”.
89. The present case is very different from the cases that are relied upon by Mr Clayton QC. These were cases in which the relevant statute had “occupied the field” (to use the language of the majority of the Supreme Court in **Miller 1**, at paragraph 48), and in which the exercise of the prerogative power would cut across and conflict with the statutory power. They were cases of an abuse of the prerogative power. In **De Keyser**, for example, the issue was whether the Government could use prerogative powers to disregard protections for the citizen that had been set out in a statute. In the **Fire Brigades Union** case, the Secretary of State had declined to bring into force a new Criminal Injuries Compensation Scheme, as provided for by s117 of the Criminal Justice Act 1988, and instead purported to use the prerogative to introduce a new and less generous scheme. In these cases, as the majority of the Supreme Court pointed out in **Miller 1**, at paragraph 48, the scope of the prerogative had been curtailed by necessary implication.
90. There are several cumulative reasons why the present case is different.
91. The first is that, in my judgment, statute has not “occupied the field” so far as the introduction of procedural guidance and directions for PCPs is concerned. There is no express statutory provision which prohibits the Secretary of State from issuing non-statutory guidance or directions about the procedures to be followed by PCPs.
92. The Appellant relies on paragraph 2(1) of Schedule 11A to the 2002 Act. This provides that:
- “2(1) Regulations under paragraph 1 must make provision about the procedures to be followed by the Secretary of State in reaching a decision under section 141 B(2).”
93. The Secretary of State has complied with paragraph 2(1) by making the 2012 Regulations. These Regulations lay down the general structure of the procedures: the four-stage procedure consisting of the “case to answer stage, fact-finding by the PCP, a recommendation by the PCP if there is a finding against the teacher, and then the decision on sanction by the Secretary of State. Regulation 7(1) also imposes some very limited and basic procedural requirements for PCPs, set out in Regulations 7 and 9 to 12A, and consisting of an obligation to determine all cases following a hearing, unless the teacher requests in writing for a determination on the papers (Reg 7(2) and (3)); the grant of entitlement to the teacher to appear and be represented at the hearing (Reg 9); the power given to the Secretary of State or the PCP to require attendance of witnesses or the provision of documents or material evidence (Reg 10); the requirement for hearings to be held in public (Reg 11); the power to require evidence to be given on oath or affirmation (Reg 12); and the limitation of evidence requirements to the effect that no-one can be required to provide evidence that could not be required in a court of law (Reg 12A).

94. I reject Mr Clayton QC's submission that this means that statute has "occupied the field" so far as procedural rules and guidance are concerned, and so that any more detailed provisions are ultra vires. Regulation 2(1) of Schedule 11A to the 2002 Act does not mean, by necessary implication, that the Secretary of State is barred from issuing any procedural rules and guidance beyond that which is set out in the Regulations themselves. The Secretary of State complied with the mandatory obligation set out in paragraph 2(1) by making provision for the four-stage process and then by laying down some general and fundamental procedural rules for PCPs. In my judgment, paragraph 2(1) does not mean that all procedural rules, let alone all procedural guidance, needs to be set out in a statutory instrument. It makes sense that something as fundamental as the delegation of certain parts of the function to an independent panel should be set out in a statutory instrument, and that fundamental requirements such as the requirement to have a hearing should be in the statutory instrument, but it does not follow that Parliament intended that the "nuts and bolts" of the procedures must also all be contained in a statutory instrument.
95. In my view, it would make no sense at all to interpret paragraph 2(1) of Schedule 11A to mean that every procedural requirement for PCPs, however minor, must be set out in the statutory instrument.
96. Still further, much of the TRA Procedures Document consists of guidance, rather than anything that could properly be described as "rules". There is no suggestion in Schedule 11A to the 2002 Act that any ministerial guidance must be set out in a statutory instrument.
97. Mr Clayton QC pointed out that the rules of procedure for Employment Tribunals are set out, in detail, in a statutory instrument (The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1327. However, the form of the statutory authorisation for procedural rules for Employment Tribunals is different. Section 7(1) of the Employment Tribunals Act 1996 provides that:
- "7(1) The Secretary of State may by regulations ..... make such provision as appears to him to be necessary or expedient with respect to proceedings before employment tribunals"
98. The remainder of section 7 of the Act then goes into considerable detail about what matters the Rules of Procedure Regulations should cover. There is no equivalent to s7 in Schedule 11A to the 2002 Act.
99. In any event, even in the face of a very detailed set of Rules of Procedure for Employment Tribunals, as required by s7 of the Employment Tribunals Act 1996, the practice has developed of the Presidents of Employment Tribunals in England and Wales, and in Scotland, respectively, issuing non-statutory Presidential Practice Directions and Presidential Guidance from time to time. It has never been suggested, so far as I am aware, that these are ultra vires.
100. Also, there is a difference between Employment Tribunals and PCPs. Employment Tribunals are part of the HM Courts and Tribunals system, whilst PCPs are not. Employment Tribunals have to deal with a very wide range of claims, whereas PCPs are panels set up by the Secretary of State to perform a narrow, though very important, function.

101. Accordingly, I reject the submission that statute has “occupied the ground”, comprehensively, in relation to the rules and guidance concerning the procedures to be followed by PCPs, such that the Secretary of State has no residual power to issue more detailed rules and guidance.
102. Moreover, in my view, there is no basis for any suggestion that the TRA Procedures Document somehow cuts across or is in conflict with the procedures that are set out in the 2012 Regulations themselves. The contents of the TRA Procedures Document are wholly consistent with the procedural rules that are set out in the 2012 Regulations. The Document builds on and complements the rules in the Regulations. This case can be distinguished from cases such as **De Keyser** and the **Fire Brigades Union** case, in which a Government Department purported to use non-statutory powers to side-step protections that had been granted to individuals by statute.
103. For all of these reasons, I conclude that the Secretary of State acted within his powers when issuing the TRA Procedures Document. It follows that the Appellant’s argument that the decision to make the Prohibition Order must be set aside because the PCP had regard to the TRA Procedures Document is rejected. The PCP was fully entitled to have regard to the Document.

**Even if the TRA Procedures Document was ultra vires, should this result in the appeal being allowed?**

104. Since I have already concluded that the TRA Procedures Document was not ultra vires, I will deal with this point only briefly. Mr Steele submitted that, even if the Appellant was right that the Document was ultra vires, it did not follow that the appeal should be allowed on this ground. He submitted that there is no reason to think that the PCP’s decision on the procedural issues would have been any different if the TRA Procedures Document had never been issued.
105. In my judgment, Mr Steele’s argument is correct. Mr Clayton QC accepted that, even if the Document had not been issued, the PCP would have been entitled to regulate its own procedures. In so doing, it would inevitably have had to reach a view on procedural issues which are not catered for or resolved by the very limited and general procedural rules set out in the 2012 Regulations. In my judgment it is clear that the PCP’s decisions on these matters would have been the same even if the TRA Procedures Document had never been issued and taken into account.
106. Whilst it is true that the PCP made reference to the TRA Procedures Document, the PCP’s decisions on the contested procedural issues were based on general principles of fairness, efficiency and the interests of justice, rather than upon any special rules that had been laid down in the Document. As I have said, much of the Document simply sets out general principles of fairness etc that would be applied by a panel or tribunal in any event.
107. When considering whether to grant an adjournment, the PCP considered whether the TRA had complied with the service requirements of the Notice of Proceedings, as set out in the TRA Procedures Document, and whether the Notice complied with the requirements as regards to content in the Document. These requirements were all safeguards that were built into the procedure for the benefit of the teacher. Even if

the Document had not been issued, the PCP would inevitably have considered whether the Appellant had properly been served with notice of the hearing.

108. It is true that the PCP then referred to its discretion under paragraph 4.29 of the Document to proceed in the absence of the teacher. Again, however (and subject to the Appellant's separate argument that there is a statutory duty not to proceed in the absence of a teacher, save in exceptional circumstances, which I will deal with below), such a discretion would have existed in any event, irrespective of the existence of the Document. The PCP considered this issue by reference to the general case law on proceeding in the absence of a party in criminal cases, set out in **R v Jones** [2003] 1 AC 1. The specific provisions of the PCP did not have any impact on the PCP's decision on this issue.
109. The same applies to the application to adjourn. The PCP applied general principles of fairness. It did not even refer to the Document in this part of its decision.
110. As for the applications to admit late evidence, the PCP referred to paragraphs 4.18 and 4.25 of the Document but these do no more than say that admission of such evidence is a matter for the discretion of the PCP, and that the PCP should take into account fairness and is the extent to which the fresh evidence is relevant. This is no more than a statement of general principle, which would have applied in any event, regardless of the TRA Procedures Document.
111. It follows that the PCP did not disadvantage the Appellant in any way by having regard to the TRA Procedures Document, and there is no basis for thinking that the PCP would have undertaken its decision-making process any differently if it had not had regard to the Document. It follows in turn that, even if the Document had been ultra vires, this would not have been a reason to allow the Appellant's appeal.

**Ground iii) The Claimant had a right to attend the hearing, or to give evidence by Skype**

112. The Appellant did not attend the hearing. As I have said, he had moved to Canada some time before the hearing took place. In the written application to adjourn dated 15 March 2019, filed by the Appellant's solicitors, the PCP was notified that "Dr Jones is unable to attend or send legal representation to the hearing on Monday 18 March 2019." At lunch-time on the last day of the hearing, 22 March 2019, the Appellant's solicitor notified the Presenting Officer that, in light of the PCP's refusal to adjourn, he was now willing to give evidence via Skype, ie by video-link, and that he could do so the following Monday, 25 March. The Presenting Officer immediately informed the PCP and the PCP considered the application straight away. The PCP decided not to permit this to happen. The reasons are set out in the extract from the PCP's decision set out earlier in this judgment.
113. The Appellant contends that the decision to proceed in his absence was an error of law and meant that the decision to impose a Prohibition Order was unlawful.

**Regulation 9**

114. Mr Clayton QC first relies on regulation 9 of the 2012 Regulations. I have set it out once already, earlier in this judgment, but I will set it out again here:

**“9. Entitlement to appear and be represented at hearings.**

A teacher who is the subject of a case may appear and make oral representations, and be represented by any person, at any hearing at which the case is considered.”

115. In his written skeleton argument, Mr Clayton QC submitted that regulation 9, properly understood, means that a teacher has an absolute right, in all circumstances, for the hearing to take place in his presence, and if a teacher does not attend, for whatever reason, the PCP hearing cannot go ahead. By the time of the hearing, Mr Clayton QC had resiled from this position, accepting that this cannot be what the regulation was intended to mean. If that were so, it would mean that a teacher could block disciplinary proceedings indefinitely simply by refusing to attend a disciplinary hearing, and the Secretary of State would be powerless to do anything about it. Mr Clayton QC accepts that would be incompatible with public policy and cannot be what Parliament intended.
116. Mr Clayton QC therefore accepts that, notwithstanding the use of the word “Entitlement” in the heading to the regulation, regulation 9 should not be interpreted to mean that a PCP hearing can only proceed if the teacher attends, even if there is no good reason for the non-attendance, and even if the non-attendance is a ploy to prevent the disciplinary proceedings from moving forward.
117. Mr Clayton QC submits, however, that the combination of the use of the word “Entitlement” in the heading, and the word “may” in the body of the regulation, which he says should be interpreted to mean “must”, has the effect that there is a strong presumption that a teacher who wishes to attend the PCP hearing should be permitted to do so, if necessary by adjournment or by the use of a video-link.
118. The fundamental difficulty with this part of the Appellant’s argument, in my judgment, is that the PCP did indeed proceed on the basis that there is a strong presumption that the teacher should be able to attend the PCP hearing. The PCP directed itself that the discretion to commence a hearing in the absence of a teacher should be exercised with the utmost care and caution, and that it is only in rare and exceptional circumstances that the decision should be taken in favour of the hearing taking place. The PCP noted that its discretion was severely constrained. The PCP took account of the factors referred to by the House of Lords in the criminal case of **R v Jones**, in which the House stressed the degree of caution that should be applied before a decision to go ahead in the absence of the person who is effectively the “defendant” is taken. The House of Lords in **R v Jones** made clear that there can be circumstances in which even a criminal case should go ahead in the absence of the accused.
119. In this case, therefore, the PCP did in effect apply what could be described as a “strong presumption” that the case should not proceed without the teacher unless there are strong reasons for doing so. It follows that, even if Mr Clayton QC is right to submit that regulation 9 should be interpreted to mean that there is a strong presumption that a teacher who wants to attend a PCP hearing should be permitted to attend it, the PCP did not err in law.

120. However, I should not be taken to endorse Mr Clayton QC's use of the phrase "strong presumption" as a gloss on the language of regulation 9. As is so often the case, it is better to stick with the statutory language itself, rather than to put it into different words. In my judgment, the PCP directed itself impeccably on the test to be applied when deciding whether to proceed in the absence of the Appellant.
121. Mr Clayton QC pointed out that in the **Jones** case, the defendant had absconded, and that is not the position in the present case. In my judgment it is clear from the written decision that the PCP did not fall into the obvious trap of assuming that the facts of the Appellant's case were exactly the same as the facts of **R v Jones**. The PCP took account of the facts of this case when deciding to go ahead.
122. It is important to note that the Appellant does not submit that, if the PCP directed itself correctly in law on the question whether to proceed in his absence, that decision was nonetheless unlawful because it was perverse. In my judgment, he was right not to advance this argument. It would be hopeless to argue that the decision of the PCP to go ahead in the Appellant's absence was perverse. The written decision demonstrates that the PCP took all relevant considerations into account and the decision that it reached was plainly one that was open to it. The Appellant had made clear, through his solicitors, on 15 March 2019 that he did not intend to attend. He did not at that point make an application for an adjournment on the basis of his non-attendance: his application for an adjournment was on a different basis, namely that there had not been full disclosure by the College. There was no indication or suggestion that the Appellant would attend if the hearing in March 2019 was adjourned. The PCP was aware of the nature of the Appellant's defence. Ten witnesses had been lined up to take part in the proceedings (and in the event Pupil A attended as an eleventh witness). The process of giving evidence was plainly going to be stressful for many of these witnesses, including the pupils (who were now university students). It should not hang over them any longer. The events in question had taken place over three years ago, and memories would fade. It was important to move forward, and public confidence in the PCP process might be affected if there were further open-ended delays. The Court of Appeal has made clear that disciplinary panels should carefully consider applications to adjourn, because of their potential impact upon the fair, economical, expeditious and efficient disposal of allegations against professional persons: see **Hayat**, and **General Medical Council v Adeogba** [2016] 1 WLR 3867. Against that background, it was open to the PCP, and, indeed, plainly right, in my view, for the PCP to conclude that it was appropriate to go ahead in the absence of the Appellant.
123. Mr Clayton QC criticises the PCP for referring to the Appellant having "waived" his right to attend. He says that this was inapt, given that the Appellant was unable to attend for financial reasons and that he had applied for an adjournment. I do not think that this is a fair criticism of the PCP. The PCP was not using the word "waived" as a technical term of art. It was using the word to describe the state of affairs, regarding the Appellant's decision not to attend, which the PCP had fully described in its decision. The Appellant knew the date of the hearing and made clear in advance, through his solicitors, that he did not intend to attend.
124. So far as the application for the Appellant to give evidence by Skype video-link is concerned, in my view this did not give rise to any issue under regulation 9 at all. If the PCP had acceded to the Appellant's application to give evidence by Skype, this

would not mean that he would be “appearing” or making representations at the hearing. I do not say this because he would physically be in a different place from the PCP. There can readily be circumstances in which a litigant attends and “appears” at a hearing via video-link. But the purpose of the application for Skype evidence was not so that the Appellant could attend and take part in the proceedings. Almost all of the hearing would be over by the time that his evidence came to be given. Rather, the application in relation to appearing by Skype was an application to give witness evidence in that manner, not an application to “appear” at the hearing, and the PCP was right to treat it as an application to give last-minute evidence.

### **Article 6**

125. Article 6.1 of the European Convention on Human Rights, imported into domestic law by the Human Rights Act 1998, provides as follows, in relevant part:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

126. It is common ground that Art 6 applies to the proceedings of the PCP, because the outcome of the proceedings may have a major impact in determining whether the teacher will be able to continue to pursue his/her profession. In my view, however, it cannot realistically be argued (and was not argued) that Article 6.1 requires that no case ever proceeds in the absence of the main party, regardless of the circumstances. It was wholly consistent with Article 6.1 for the PCP to decide to go ahead in the Appellant’s absence, especially bearing in mind the PCP’s anxious scrutiny of the matter and its reminder to itself that the discretion to go ahead with a hearing in the main party’s absence should be exercised with the utmost care and caution.
127. Equally, there was no breach of Art 6 as a result of the decision not to permit the Appellant to give evidence by Skype, given that it was made at such a late stage, and give the matters referred to at paragraph 130 below. Mr Clayton QC referred to **Polanski v Conde Nast Publications Ltd** [2005] 1 WLR 637, but that case was on very different facts – it was about whether the well-known film director was entitled to bring proceedings in England to protect his civil rights notwithstanding that he was a fugitive from justice. The application in **Polanski** was made long before the trial began. Art 6 does not grant litigants an inviolable right to give evidence, regardless of the stage in the proceedings at which the request is made. This applies whether the request is to give evidence in person or by video-link.

### **The suggestion that the PCP erred in law in deciding not to allow the Appellant to give evidence by Skype, rather than admitting it and giving it such weight as the PCP thought fit**

128. In the course of his oral submissions, Mr Clayton QC submitted that the PCP erred in law in treating the decision whether it should allow the Appellant to give evidence by Skype on 25 March 2019 as a “binary” decision. He said that the right thing for the PCP to do would have been to admit the Skype evidence and then to give it such weight as it thought fit. He acknowledged that the application was made very late, at a point after the other witnesses had given their evidence, and so any new points made

by the Appellant could not be put to the TRA's witnesses or to Pupil A. He recognised that this may substantially reduce the weight to be given to the evidence, but he said that the PCP erred in law by treating the issue as one of admissibility, rather than by admitting the evidence and then giving appropriate weight to it.

129. In my view, despite the Appellant's position being that he was not making a perversity challenge to the procedural decisions of the PCP, this is, in reality, a simple perversity challenge. Mr Clayton QC's real point is that it was outside the bounds of reasonable discretion for the PCP to decide to refuse to hear the evidence altogether, rather than to admit it and to give it appropriate weight.
130. In my judgment, there is no substance to this ground of challenge. The PCP was plainly entitled to decide to refuse to hear evidence from the Appellant by Skype in circumstances in which (a) the hearing was almost over, when the application was made; (b) the Appellant, who was legally represented, had not made any such application in advance of the hearing; (c) the Appellant had been notified via the Presenting Officer that if he had any more evidence to put forward he should do so by lunch-time on Thursday 21 March 2019; and (d) most importantly of all, the other eleven witnesses in the case had already given their evidence and departed, so there would be no opportunity to put any fresh points to the other witnesses. I have read the witness statement that the Appellant submitted on 22 March 2019, and I am very doubtful whether it raises any new matters or would have made any difference to the outcome of the hearing, but if and to the extent that it did raise new matters, the PCP was entitled to take the view that it was too late.
131. The Appellant also complains of inadequacy of reasons. In my judgment, the PCP gave ample explanation for its decision. The PCP explained that it considered the application on the basis that it should admit late evidence if it would be fair to do so and the evidence was relevant. The PCP took account of the fact that the Appellant had previously been able to set out his position to the PCP. So, in particular, the Appellant had set out his position by means of two written submissions, one from his then counsel dated 30 September 2015, and one from the Appellant himself dated 18 June 2017. The PCP took account of the timing of the application, after the TRA had called its witnesses and closed its case and expressed the view that it would be unfair to admit evidence after that other evidence had already been given. To the extent that the Appellant's evidence covered new ground, the witnesses could not deal with it. The PCP also bore in mind the reasons it had previously given for deciding to go ahead in the Appellant's absence.

**Ground iv) The PCP erred in law in declining to accede to the Appellant's application to adjourn the hearing because of failures in relation to disclosure**

132. As I have said, the Appellant's solicitors applied for an adjournment of the PCP hearing on 15 March 2019, the last working day before the hearing began. The ground relied upon was a failure by the College to provide all of the disclosure sought by the Appellant. The PCP refused to grant an adjournment on this ground.
133. In January and February 2019, there was correspondence between the Appellant's solicitors and the Presenting Officer about disclosure from the College. The College had said that, because of data protection concerns, it did not want to disclose documents voluntarily, but the College would be willing to do so if the TRA gave a

direction to that effect. The Appellant's solicitors and the Presenting Officer reached an agreement about what the disclosure request should contain, albeit that the Presenting Officer did not agree that all of the disclosure sought was necessary: she said that she would agree to a direction in order to progress the matter, as the hearing was fast approaching. On 22 February 2019, the TRA gave a direction to the College for disclosure of certain documents.

134. The College disclosed most of the documents that were asked for but was unable to disclose some emails which were to or from six former teachers who had since left the College. The reasons why was explained to the PCP in a written statement from Ms Metcalfe, the College's Human Resources Manager. She said that the problem was that the documents were archived and the archive was encrypted and password-protected. The only person who was privy to the password was the College's former Head of IT. He no longer works at the College and is the subject of an ongoing police investigation. The College contacted the police force which was conducting the investigation into the former Head of IT, and the police passed on a message asking for the password. The response from the former Head of IT was that he could not remember it. The College then made contact with an IT expert company, 7Safe, and was told that, without the password, the emails could not be accessed by commercially available means. It was possible that the emails could be accessed by law enforcement agencies but otherwise they were now inaccessible.
135. The Appellant submits that, against that background, the PCP erred in law in refusing to adjourn because the emails had not been delivered up.
136. Mr Clayton QC submitted that this ground was concerned with an error of law because the PCP had misdirected itself by saying that the problems with accessing the emails meant that they were not "held" by the College. Mr Clayton QC said that documents are held electronically by a person, if they are on the person's system, even if that person is unable to access the documents.
137. In my judgment, this did not give rise to an error of law by the PCP. The question whether documents which are inaccessible but which are still in a person's system, are "held" is, with respect to Mr Clayton QC, something of a semantic point. Either way, the practical reality is that it is outside the person's power to disclose them. The reason why the PCP declined to grant the adjournment was because it took the view, based on evidence, that the emails were inaccessible and would never become accessible. The decision was not affected by any metaphysical question as regards whether, in these circumstances, the documents could properly be said to be "held".
138. In my judgment, this is really a perversity challenge. This is, in reality, a complaint that no reasonable PCP could have declined to adjourn in these circumstances.
139. As for the perversity challenge, in my judgment it was well within the scope of the PCP's discretion, as a reasonable panel, to decide that it should not adjourn the hearing because of the problem with disclosure. The key reason, and the one relied upon in the PCP's decision, is that there was no realistic prospect of obtaining disclosure of these documents even if there had been an adjournment. The College had taken all of the steps that it could realistically take to release the archived material and had come to a dead end. Although it might have been possible for law enforcement agencies to decrypt the emails, there was no suggestion that there was

any realistic chance that any law enforcement agency would be persuaded to do this. The disciplinary proceedings against the Appellant did not involve any law enforcement agencies. There was no point in adjourning because there was no reason to think that a delay would mean that the emails could be produced.

140. There was no suggestion on behalf of the Appellant that the explanation given by Ms Metcalfe on behalf of the College was false. As Mr Steele pointed out, even in civil proceedings governed by the CPR, a party does not breach its disclosure obligations by failing to provide disclosure of documents held electronically to which it cannot obtain access.
141. In so far as this Ground also contains a challenge under Art 6, it is misconceived. Art 6 does not prevent a PCP from regulating its own procedures in a fair and reasonable manner.
142. Accordingly, I reject this ground of appeal.

**Ground v) The Panel should have admitted a witness statement from the Appellant and one from Ms Gill O’Sullivan, the former College Nurse Manager**

143. The application to file these statements was made at lunchtime of the final day of the hearing, Day Five, Friday 22 March 2019. Two days previously, the Appellant’s solicitors had been notified by the Presenting Officer that the hearing would shortly conclude and that any further evidence should be filed by lunch-time of Thursday, 21 March. The Appellant did not meet this deadline. Rather, he supplied his witness statement on the afternoon of Friday, 22 March and the statement of Ms O’Sullivan on the following Monday, 25 March. The Appellant’s application also referred to a third statement, from another former member of the College, but in the event no statement was supplied from this person.
144. The grounds of the Appellant’s appeal against this decision were essentially the same as the grounds of his appeal against the decision not to allow him to give live evidence by video-link. For the same reasons I have already given in relation to the ground of appeal relating to the Skype application, under Ground iii), above, I reject this ground of appeal. It is essentially a perversity challenge, but the decision to refuse to admit last minute evidence was well within the reasonable scope of the PCP’s powers. The Appellant had been given ample opportunity to put in such evidence in a timely manner but had failed to do so. He eventually made his application one day after the expiry of the very final deadline, of which had had been notified. The PCP was plainly entitled to come to the view that it would be unfair on the TRA and the other witnesses to raise new matters at this very late stage, potentially necessitating other witnesses to give evidence a second time. To the extent that the new statements did not raise new matters or were of marginal relevance, no purpose would be served by admitting the evidence. I have read the Appellant’s statement, and that of Ms O’Sullivan, and neither raises important new issues of fact. Both statements are largely comment, and Ms O’Sullivan made clear that she had no direct involvement in any of the events that led to the allegations against the Appellant.
145. In my judgment, the PCP gave sufficient reasons for its decision on this issue. Mr Clayton QC’s skeleton argument said that there was no reference in the PCP’s reasons

to admit these witness statements, but this is wrong: the application to adduce these further witness statements is specifically referred to in the passage from the PCP's decision which is set out at paragraph 62, above.

146. Finally, if and in so far as there is an Art 6 challenge in Ground v), I reject it. In taking the decision complained of, the PCP was simply taking a procedural decision in a fair and reasonable manner, and there was no infringement of Art 6 in so doing.

**Ground vi) For the above reasons, the Secretary of State acted unlawfully in purporting to have regard to the PCC's recommendations by imposing the Prohibition Order without a review period**

147. This is not a free-standing ground of appeal. Rather, as was common ground, if the Appellant had been successful in persuading me that there was an error of law or serious procedural error in the PCP's decision, then the consequence would be that the appeal against the Secretary of State's decision to make a Prohibition Order should be allowed, with a view to a new hearing taking place with (presumably) a differently-constituted PCP. However, as I have rejected the other grounds of appeal, there is no basis for allowing the appeal against the Secretary of State's decision.

**Conclusion**

148. For the above reasons, this appeal is dismissed.